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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. ) CASE NO. 14-CV-704-GKF-JFJ  
 )  
(1) OSAGE WIND, LLC; )  
(2) ENEL KANSAS, LLC; and )  
(3) ENEL GREEN POWER NORTH )  
AMERICA, INC., )  
 )  
Defendants. )

TRANSCRIPT OF RECORDED PROCEEDINGS  
FEBRUARY 11, 2020  
BEFORE THE HONORABLE JODI F. JAYNE,  
MAGISTRATE JUDGE PRESIDING

**MOTION HEARING**

Transcript Prepared by Greg Bloxom, RMR, CRR

U.S. District Court  
Northern District of Oklahoma

A P P E A R A N C E S

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1 PROCEEDINGS:

2 -----

3 **THE DEPUTY COURT CLERK:** This is United States vs.  
4 Osage Wind, LLC, et al., case number 14-CV-704-GKF-JFJ.  
5 Counsel, please enter your appearances.

6 **MS. McCLANAHAN:** Cathryn McClanahan on behalf of the  
7 United States.

8 **MR. BABST:** Charles Babst, of counsel, and with the  
9 United States Department of the Interior.

10 **MR. FIELDS:** Nolan Fields with the United States.

11 **MR. RAY:** Your Honor, good morning. Ryan Ray on  
12 behalf of Enel Green Power North America, Enel Kansas, and  
13 Osage Wind.

14 **MS. STEVENSON:** Your Honor, Sarah Stevenson also on  
15 behalf of the defendants.

16 **THE COURT:** Good morning. And I understand there  
17 might be some people on the phone?

18 **MS. NAGLE:** Yes. Good morning, Your Honor. This is  
19 Mary Kathryn Nagle of Pipestem Law representing the intervenor  
20 plaintiff or seeking to be intervenor plaintiff, Osage Mineral  
21 Council.

22 **THE COURT:** And if anybody else needs to join later,  
23 Ms. Nagle, that's fine, you can just announce that they're on  
24 the phone at that time. I understood maybe --

25 **MS. NAGLE:** Thank you.

1           **THE COURT:** Yeah, sure.

2           Okay. This was set for hearing on defendants' motion for  
3 quash and/or motion for protective order, which is docket 106.  
4 Mr. Ray, I'll recognize you in support of your motion. At this  
5 time, I have, of course, reviewed all your briefs. I'm not  
6 interested in any arguments on standing. I think the briefs  
7 are sufficient on that issue. As to other issues, I just have  
8 a few questions for you and then I'll permit you to make any  
9 further argument --

10           **MR. RAY:** Certainly, Your Honor.

11           **THE COURT:** -- that you wish to make.

12           **MR. RAY:** I'll be pleased to -- if the court has  
13 questions, I'll be pleased --

14           **THE COURT:** Yeah, I'd like to start with questions and  
15 then I'll let you follow up with any other arguments.

16           **MR. RAY:** Certainly, Your Honor. Thank you.

17           **THE COURT:** Okay. I've read the transcript of the  
18 scheduling conference in front of Judge Frizzell. My reading  
19 of that transcript is that he seems to have permitted the  
20 United States fairly broad discovery on these legal remedies  
21 and even knowing that there was going to be legal issues  
22 presented regarding the proper remedies. Did you have a  
23 different takeaway from that scheduling conference or did  
24 defendants have a different takeaway?

25           **MR. RAY:** I did, Your Honor, and we did. I don't

1 believe or recall that Judge Frizzell specifically made any  
2 findings about the scope of discovery, and I would note, Your  
3 Honor, that there are three motions pending in front of Judge  
4 Frizzell right now about -- that really go to two issues, which  
5 is: Who is the proper party in this case at this time, and  
6 what remedies are they permitted to seek.

7 Now, Your Honor, this case involves a wind energy project  
8 in Osage county and there's a very long history of litigation  
9 here. There's been a number of cases, there's a prior case in  
10 this court, and there were three or four cases in state court,  
11 several of which went to the Oklahoma Supreme Court, that were  
12 brought either by or at the behest of the Osage Minerals  
13 Council, as this case is.

14 Now, this case, Your Honor, presents a narrow issue which  
15 is the Tenth Circuit concluded that because Osage Wind sorted  
16 rock, crushed rock, and used rock, that rock that was sorted  
17 and crushed in turbine foundations, that that activity and that  
18 activity alone required a lease to be granted under some  
19 specific provisions in the Code of Federal Regulations.

20 So, when we go, Your Honor, to the question of remedy, we  
21 believe that the wrong found by the Tenth Circuit is limited to  
22 those minerals that were subject to that operation. It is not  
23 a situation where the Tenth Circuit said this entire project is  
24 unlawful. And we would submit, Your Honor, that there's no  
25 fair reading of the Tenth Circuit's opinion consistent with

1 that.

2 After all, we must remember, Your Honor, that the  
3 regulation that the Tenth Circuit found applies to the science,  
4 technique, and business of mineral development. Well, this is  
5 not a mineral development operation, but the Tenth Circuit said  
6 a specific part of the construction constituted mineral  
7 development. And so, to that end, Your Honor, we look,  
8 consistent with the -- with another part of the regulations  
9 which talks about these leases being done on a royalty-based  
10 calculation, based upon the value of minerals, that that is the  
11 inquiry that we should be engaged in.

12 Your Honor, we're engaged in responding to discovery  
13 consistent with that analysis and we have not opposed other  
14 subpoenas that we believe go to that issue, to let's look at  
15 what type of materials were subject to the activities that the  
16 Tenth Circuit found to be unlawful under the regulations and  
17 what is the value of those materials. That's appropriate  
18 discovery and we are willing to participate in that. But --

19 **THE COURT:** And you're asking this court to decide  
20 today that the subpoenas to Hooper, particularly as to the  
21 issue I think you're talking about now, the subpoenas to Hooper  
22 are, as a matter of law, outside the scope of whatever the  
23 Tenth Circuit has permitted as to legal damages in this case  
24 and, therefore, I should find it irrelevant and not permit the  
25 subpoenas. Is that correct?

1           **MR. RAY:** That, or, Your Honor, at least defer until  
2 Judge --

3           **THE COURT:** Right. That's your alternative request,  
4 is defer?

5           **MR. RAY:** -- Frizzell makes that determination.

6           And I would note, Your Honor, there are two subpoenas,  
7 Hooper Corporation who installed power lines, and we believe  
8 the most, based on conferring with our client and conferring  
9 with the Hooper Corporation, that they didn't engage in any of  
10 this rock sorting, crushing, using for foundations. They  
11 simply dug dirt. And the Tenth Circuit said if you dig holes  
12 in the ground, it's only going further that gives rise to these  
13 regulations, it's not that act.

14          Now, there also is --

15           **THE COURT:** Didn't the United States cite some -- I  
16 don't know, maybe it was from their website, something from  
17 their website saying what they did on this project, they  
18 drilled down beyond industry standards, I think it said?

19           **MR. RAY:** But what was not there, Your Honor, was any  
20 indication that they engaged in sorting, crushing, and using of  
21 rock, and it's that activity that the Tenth Circuit found to be  
22 unlawful. Just digging a hole in the ground, the Tenth Circuit  
23 very clearly said that is not mining.

24          Now, Your Honor, there's also a second subpoena that's at  
25 issue in our motion, and that's to AEI, --

1           **THE COURT:** Sure.

2           **MR. RAY:** -- that's Associated Electric Cooperative  
3 Incorporated, and --

4           **THE COURT:** And I want to stop you for just a second,  
5 --

6           **MR. RAY:** Certainly.

7           **THE COURT:** -- Mr. Ray, because something you said  
8 made me -- I want to make sure I have this right. There's only  
9 one subpoena to a Hooper Corporation; right?

10          **MR. RAY:** That's correct.

11          **THE COURT:** You weren't trying to tell me there's two  
12 separate Hooper entities? Just the one?

13          **MR. RAY:** There's one subpoena --

14          **THE COURT:** Okay. Yeah.

15          **MR. RAY:** -- that we know of.

16          **THE COURT:** Got it.

17          **MR. RAY:** There's Hooper that did -- that did the --

18          **THE COURT:** The power lines?

19          **MR. RAY:** -- installation of these power lines, and  
20 then there's AECI which purchases power from -- from the  
21 project. And, Your Honor, the AECI subpoena is, we think, the  
22 most clearly outside the scope of discoverable information.  
23 Given that the Tenth Circuit tied its finding of wrong to  
24 activity that AECI clearly was not involved in in any manner,  
25 they were not involved in this project in the construction



1 phase, and we have no objection or producing information about  
2 everything that was done in construction, but this subpoena to  
3 AEI is expressly targeted at what AEI purchased power for the  
4 project on and those -- those type of amounts, payments,  
5 records about that.

6 Now, Your Honor, that could only be discoverable under the  
7 contention that the project itself is somehow unlawful, which  
8 the Tenth Circuit clearly did not permit that. It clearly only  
9 found that a limited aspect of construction required a lease to  
10 be had.

11 **THE COURT:** Now, aren't they seeking that in the event  
12 that they -- I think Judge Frizzell called it an election of  
13 remedies. You know, assuming that remedy is permitted to  
14 proceed, isn't that information being requested on this  
15 disgorgement equitable remedy? And I understand defendants'  
16 argument is that should not be permitted in this case, and that  
17 issue is pending before Judge Frizzell, I believe.

18 **MR. RAY:** That's correct, Your Honor.

19 **THE COURT:** Is that correct?

20 **MR. RAY:** It's pending in front of Judge Frizzell.  
21 Frankly, it's certainly based on the United States' motion to  
22 amend and in the Osage Mineral Council's motion to intervene,  
23 we very clearly raised that issue --

24 **THE COURT:** Right.

25 **MR. RAY:** -- in both of those, and then we also have a

1 motion for judgment on the pleadings pending as to the United  
2 States on the grounds that their failure to appeal bars them  
3 from further participation in this case. Now, clearly, Your  
4 Honor, we're not saying no one can participate in this case.  
5 We believe that the one and only plaintiff should be --

6 **THE COURT:** Yeah, I read that footnote.

7 **MR. RAY:** -- OMC.

8 **THE COURT:** I was curious what your position was on  
9 that. I was interested to know that you believed somebody  
10 should be permitted to prosecute it.

11 **MR. RAY:** That's right, Your Honor. Clearly we are  
12 not saying that no one should be allowed to proceed. We're not  
13 saying that, Judge.

14 **THE COURT:** Okay.

15 **MR. RAY:** There's no way we would say that. But we  
16 believe that the OMC, who is the only party that prosecuted an  
17 appeal in this case, --

18 **THE COURT:** Uh-huh.

19 **MR. RAY:** -- that they -- they should be allowed to  
20 intervene consistent with the Tenth Circuit's opinion.

21 **THE COURT:** Okay.

22 **MR. RAY:** And when we look at the wrong that the Tenth  
23 Circuit found, it is based upon use of material.

24 And I also believe it important, Your Honor, that prior to  
25 the Tenth Circuit's decision, no one had ever adopted the view

1 that was -- that was adopted by the Tenth Circuit that these  
2 specific activities would run afoul of these regulations. It's  
3 important, Your Honor, to note that this is not material that's  
4 totally unique in the world. Certainly our clients could have  
5 gone and procured other material from another source to conduct  
6 this construction activities had there been prior notice that  
7 that type of activity required a lease under these  
8 circumstances.

9 So, we believe, given the nature of wrong that was found by  
10 the Tenth Circuit, which is sorting, crushing, using minerals,  
11 that the remedies have to be based on those minerals, they have  
12 to be based on the value of those minerals, consistent with --  
13 there's a provision in section 214, I believe it's 214.10(d),  
14 that talks about how does a lease like this work. Well, it's a  
15 royalty percentage. I believe that provision contemplates 10  
16 percent of the value of the minerals.

17 So, that -- to that end, Your Honor, to determine what  
18 amount of minerals were subject to that type of operation,  
19 what's their value, we're engaged in that discovery, Your  
20 Honor. We're very well engaged. We're frankly having much  
21 more problems with the U.S. responding to our discovery. We  
22 respectfully submit, Your Honor, that they're trying to  
23 foreclose a lot more proper discovery than we are. We'll  
24 probably unfortunately be back in front of the court on some of  
25 those issues in the near future.

1 But to the extent it goes to what materials were subject to  
2 this -- the activities that the Tenth Circuit said constitute  
3 mineral development, we're engaged in that kind of discovery.  
4 We haven't opposed subpoenas that relate to that, but frankly  
5 these subpoenas will not answer those questions.

6 **THE COURT:** If disgorgement is permitted as a remedy  
7 ultimately or elected as a remedy, do defendants concede that  
8 this information would at that time be relevant to that  
9 inquiry?

10 **MR. RAY:** I think if Judge Frizzell says, "I'm going  
11 to allow the remedy of discovery of disgorgement as to the  
12 entire project," then the AECI subpoena would probably be  
13 appropriate at that point. But as it stands today, Your Honor,  
14 with the amended complaint that we have that the United States  
15 filed, it does not -- the currently on-file complaint does not  
16 mention disgorgement at all.

17 **THE COURT:** Okay.

18 **MR. RAY:** And the --

19 **THE COURT:** Go ahead. Go ahead. Sorry.

20 **MR. RAY:** The accounting that it seeks is an  
21 accounting of minerals that were used. And again, we're about  
22 the process of providing that information fully and we have no  
23 opposition to discovery that would seek that. The injunction  
24 that that amended complaint seeks is an injunction to prevent  
25 the type of activity that the Tenth Circuit found was improper.

1 And again, we're certainly not doing that, Judge. Any  
2 discovery they want to confirm that that's not occurring at the  
3 project now nor will it, we're not opposed to that either. It  
4 is these efforts to expand the remedial relief beyond what is  
5 set forth in the first amended complaint right now, beyond the  
6 scope of that which the Tenth Circuit had before it, and beyond  
7 the scope of the proper relief for the wrong that the Tenth  
8 Circuit found. It is those efforts that we believe are not  
9 reasonably calculated to lead to the discovery of admissible  
10 evidence in this case in its current procedural posture, and at  
11 a minimum that discovery should be deferred until we have an  
12 answer from Judge Frizzell about whether -- whether these new  
13 remedial requests will be allowed and, frankly, who is going to  
14 be the plaintiff that will be allowed to pursue them.

15 **THE COURT:** On this issue of deferral, I have a  
16 question, your alternative request. I'm quoting from Judge  
17 Frizzell's hearing. He said, "We're going to try to hold  
18 you" -- you being the United States -- "to that six months. So  
19 be sure to get your experts and proceed apace." And that was  
20 in the context of a discussion about some of these legal issues  
21 that you're bringing up in front of this court right now. So,  
22 aren't you asking this court to hinder the United States'  
23 ability to do exactly what Judge Frizzell has instructed them  
24 to do?

25 **MR. RAY:** We're asking, Your Honor, that the court not

1 permit this discovery into the project's revenues, into those  
2 type of inquiries which we believe are not proper given the  
3 nature of harm found by the Tenth Circuit, given the pleadings  
4 as they now exist right now today, and frankly given the  
5 uncertainty about whether the United States is even going to be  
6 allowed to remain a plaintiff when clearly it did not file a  
7 notice of appeal within the confines of Rule 4 and its time  
8 lines. And we've cited --

9 **THE COURT:** All right. And, Mr. Ray, if you're wrong,  
10 if defendants are wrong on this issue, end up being wrong about  
11 that, isn't there a chance we're going to be right up at that  
12 six-month window and the scheduling order will be closed?

13 **MR. RAY:** Well, certainly we don't know --

14 **THE COURT:** I mean, I understand your position, but  
15 that's a very real possibility, isn't it?

16 **MR. RAY:** We certainly don't know when Judge Frizzell  
17 will make his rulings or when he will have hearings.

18 **THE COURT:** And he's very efficient, but these -- I  
19 mean, these are big motions, there's three of them and, you  
20 know, those things take time for a district court to consider,  
21 and it seems to me a very realistic possibility that if I defer  
22 this discovery, we could be at five months and --  
23 five-and-a-half months, have a ruling, and if defendants'  
24 position ends up being rejected, the United States has no time  
25 to get this discovery they need.

1           **MR. RAY:** Could that possibly be an outcome?  
2       Certainly it should. [sic] But again, Your Honor, our position  
3       is based on the pleadings as they exist today, is based on the  
4       Tenth Circuit's opinion, is based on the type of wrong that was  
5       found, which is not the project itself, which is not the mere  
6       breaking of the earth; it is this sorting, crushing, using of  
7       rock for turbine foundations. If it relates to that issue in  
8       any manner, Your Honor, --

9           **THE COURT:** Uh-huh.

10          **MR. RAY:** -- we have provided it or will provide it.  
11       We've produced several thousand pages of material. Even  
12       though, Your Honor, our position is the United States shouldn't  
13       be in at all, but we recognize someone's going to be, so we're  
14       about the the process of providing as much responsive  
15       information as we can, Your Honor, working with our client who  
16       has people all over the world. Frankly, some of this  
17       information is stored in Italy. But we're about the process of  
18       providing that information and that material that in any  
19       reasonable way relates to the rock that was sorted, crushed,  
20       and used in turbine foundations. It is principally, Your  
21       Honor, this effort to go beyond and seek the project's revenues  
22       writ large.

23          **THE COURT:** Okay.

24          **MR. RAY:** That is what we believe to be improper, Your  
25       Honor, and especially at this time given this posture we

1 believe that that's improper and at least should be deferred.

2 **THE COURT:** Is there any reason the AI -- sorry --  
3 AECI documents or any other documents revealing your client's  
4 confidential pricing or other confidential information couldn't  
5 be produced pursuant to the protective order in this case?

6 **MR. RAY:** Well, if that type of remedial relief is  
7 going to be allowed, then the protective order would, I think,  
8 afford a level of protection, but we think --

9 **THE COURT:** What I'm saying is the third parties,  
10 there's no reason to think that if you instruct them to or you  
11 communicate with them, they're not going to produce these  
12 documents pursuant to a protective order?

13 **MR. RAY:** I certainly think they would, Your Honor.

14 **THE COURT:** Okay.

15 **MR. RAY:** I think that would be the case. But at  
16 present, it's just the fundamental legal issues of who is going  
17 to be the plaintiff and what remedies are they going to be  
18 allowed to pursue. We believe, consistent with the Tenth  
19 Circuit's finding of the narrow class of activity that's  
20 wrongful, that these efforts to seek the revenues of the  
21 project entirely or discovery aimed at enjoining the project  
22 entirely, it's those type of efforts that just cannot be fairly  
23 reconciled with the Tenth Circuit's opinion and with the only  
24 complaint that is currently on file in this litigation.

25 **THE COURT:** Okay.



1           **MR. RAY:** And it's those issues. That is the reason  
2 for our request.

3           **THE COURT:** Okay. Thank you very much, sir.

4           **MR. RAY:** Thank you, Your Honor.

5           **THE COURT:** Yes.

6           **MS. McCLANAHAN:** Your Honor, I think that you have a  
7 great deal of insight into this case by reading Judge  
8 Frizzell's -- the transcript of Judge Frizzell's comments  
9 during the scheduling conference.

10           You're correct that the United States is of an opinion that  
11 the defendants are hindering our ability to do exactly what we  
12 were charged with doing. A perfect example is that, you know,  
13 we issued these subpoenas within 24 hours, 48 hours of leaving  
14 that particular hearing before Judge Frizzell, and the  
15 defendants waited almost 30 days to enter into this objection.  
16 By that time, we had already been in communication with some of  
17 the targets of the subpoena. So, it is putting us somewhat  
18 behind the eight ball because at this point the United States  
19 is a recognized party, Judge Frizzell has given us this  
20 directive to move forward with the discovery, and we're trying.

21           I would also say that while they indicated that they have  
22 turned over a great deal of material, there are also a lot of  
23 holes where they indicated they no longer had information, that  
24 there were no such relevant documents, and some of those  
25 documents relate to subcontractors. Quite frankly, the only

1 reason I know who to try and subpoena information from at this  
2 point is because of the Internet. We have not had cooperative  
3 discovery such that I understand fully the operation that was  
4 going on out there. I have researched it, like I say, on the  
5 Internet and found the kinds of things that you see there from  
6 Hooper Corp.

7 As to the discussion about the Tenth Circuit opinion, I  
8 think that the argument that is being advanced by the defendant  
9 here is just unbelievably shortsighted in a total reading of  
10 what the Tenth Circuit said.

11 The Tenth Circuit -- The Tenth Circuit certainly had  
12 before it a question about whether or not what the defendants  
13 were doing here was a wrongful activity, but that question was  
14 answered at the very end of the opinion by saying, yes, the  
15 sorting and the crushing and all those kinds of things meant  
16 that under the regulations they were doing mining, and because  
17 they were doing mining -- and this is the critical next step --  
18 because they were doing mining, we need to remand this because  
19 they were required to enter into a lease. And that's exactly  
20 what the remand says. It doesn't say anything about, "Oh, my,  
21 we've got to figure out how much was sorted, how much was  
22 crushed." It says they were required to enter into a lease.  
23 They didn't enter into a lease. What they have done is a  
24 trespass, and that's exactly what the first amended complaint,  
25 and we can look at the second amended, but let's stay with the

1 first amended since that's the one that is filed right now.

2 The first amended complaint specifically states -- it  
3 states five claims. It states two claims that are for  
4 declaratory judgment, which in the United States' opinion have  
5 now been decided, but then one for trespass, one for continuing  
6 trespass, and one for conversion. Specifically, we asked for a  
7 judgment finding the defendants liable for those  
8 things: trespass, continuing, and conversion. Those things  
9 have nothing to do with the kinds of things that they're  
10 talking about right now.

11 Trespass damages could very well include what would we have  
12 negotiated as a lease. And the defendants were very proud to  
13 state -- in the 2011 lawsuit they stated it and Judge Frizzell  
14 made it part of his findings, that some of the surface owners  
15 who it could be argued they sold rights to the minerals that  
16 they did not own below, but some of the surface owners were  
17 taking home \$250,000 per year. And now you can see that  
18 defendants are looking to pay for selected amounts of rock and  
19 limestone that were crushed out there.

20 There's no reason to think that the Osage Minerals Council,  
21 had they been properly approached for a lease, which they were  
22 required to do, we now know that, would have negotiated a  
23 ridiculously low paying lease when the land -- the surface  
24 owners were negotiating those kinds of sums.

25 **THE COURT:** So, is it the United States' position that

1 the AECI documents are relevant also to a theory of money  
2 damages on the trespass claim?

3 **MS. McCLANAHAN:** Certainly. Certainly.

4 **THE COURT:** And also this equitable -- in addition to  
5 some sort of equitable disgorgement theory, and I think -- is  
6 that governed by the *Davilla* -- is that the *Davilla* case issue?

7 **MS. McCLANAHAN:** That is the *Davilla* case. You know,  
8 --

9 **THE COURT:** Okay. But you're saying, *Davilla* aside,  
10 we also think these documents are relevant to trespass money  
11 damages?

12 **MS. McCLANAHAN:** Right, right, because at the heart of  
13 the Tenth Circuit's opinion, when you get down to the very  
14 bottom of it, sure, they can cherry pick certain words, you  
15 know, crushing, sorting, excavating, all kinds of things, but  
16 what it led the Tenth Circuit to a conclusion of was that you  
17 had to get a lease, you were invading the Osage Minerals  
18 mineral estate, you had to go get a lease and you didn't.

19 **THE COURT:** So, is part of the United States' damages  
20 model trying to reconstruct, for lack of a better term, or  
21 create this is what a lease may have looked like, this is what  
22 our percentage would have been --

23 **MS. McCLANAHAN:** I think that's --

24 **THE COURT:** -- from any profits?

25 **MS. McCLANAHAN:** -- exactly where we're at. I mean,

1 maybe the more common example would be an oil and gas lease up  
2 in the Osage. It certainly cannot be the case that, you know,  
3 a company could come in and pull oil out of the ground and then  
4 just say, "We'd like to -- we've denied you payment, we didn't  
5 come and negotiate with you, we completely denied your theory  
6 that you own those minerals, and now five years later we'd just  
7 like to pay you for exactly the oil and gas and nothing  
8 more." I mean, you know, that's not the kind of thing they  
9 would have negotiated on the front end. They would have  
10 negotiated something different.

11 And I think, you know, so far as we cited Oklahoma Statutes  
12 that would regard landowners, that statute actually does also  
13 reference mineral owners and it tells them, you know, to be  
14 careful about how you treat the mineral owners, as well.

15 But here, I think what you have are surface owners who are  
16 land owners, but mineral estate owners are landowners, as well;  
17 they just have a different bundle of rights. And in this case,  
18 the Tenth Circuit found that that bundle of rights, you had to  
19 have a lease to touch it.

20 So, with that, I think that this hyper-technical reading  
21 and pulling out of a few words, and those aren't necessarily  
22 words even out of the statute, those are just words that caught  
23 the Tenth Circuit's attention as taking it beyond, you know,  
24 just a fair surface use of a minimal amount of top soil  
25 basically is what we were talking about. I just don't think

1 there's a fair reading that would say the Tenth Circuit  
2 intended to limit damages. Damages was never briefed by any  
3 party at all. We never discussed even the issue of trespass.

4 At issue before the Tenth Circuit was simply the regulatory  
5 interpretation. So far as whether or not the United States is  
6 a party, I mean, I'm prepared to discuss the line of cases  
7 which are completely not applicable to what is happening here.  
8 I mean, in this case we have the United States --

9 **THE COURT:** I don't really need you to go into that  
10 procedural --

11 **MS. McCLANAHAN:** Okay.

12 **THE COURT:** -- issue.

13 **MS. McCLANAHAN:** Okay.

14 **THE COURT:** I know you had that discussion in front of  
15 Judge Frizzell, to some extent. That issue is fully briefed in  
16 front of Judge Frizzell. I am interested in an argument you  
17 made in your brief that really defendants are requesting -- I  
18 think you used the phrase "an advisory opinion" on the  
19 substantive legal issues pending before Judge Frizzell. I  
20 might be mischaracterizing that. I think I remember the phrase  
21 "advisory opinion." You know, I am obviously concerned about  
22 issuing rulings in the context of a relevance determination  
23 which has to be made by a magistrate judge. I'm concerned  
24 about any rulings of those interfering or being inconsistent or  
25 contradicting rulings that may ultimately be made by Judge

1 Frizzell in this case on motions that are pending before him  
2 right now.

3 **MS. McCLANAHAN:** I understand. I understand.

4 **THE COURT:** And I think that's a very real concern in  
5 this case. Would you address that briefly? I think I know  
6 your position, but --

7 **MS. McCLANAHAN:** Sure. And insofar as the United  
8 States is a party, the defendants have already said they've  
9 engaged in discovery with us. If we were a stranger to this  
10 lawsuit, they wouldn't have engaged. Insofar as the reaches of  
11 the Tenth Circuit opinion, I feel like, you know, we need to go  
12 back to the basics of Rule 26 which allows --

13 **THE COURT:** Right.

14 **MS. McCLANAHAN:** -- pretty broad-brushed discovery,  
15 you know, anything that might lead to discoverable evidence,  
16 and that taken with just the very final paragraph of the Tenth  
17 Circuit's decision which said you had to get a lease, to do  
18 whatever it is you were doing, --

19 **THE COURT:** Uh-huh.

20 **MS. McCLANAHAN:** -- you had to get a lease. At the  
21 very least, that's what they're opening up and that's what  
22 they're telling us we should be doing discovery on.

23 **THE COURT:** I think you've answered this question,  
24 but -- I mean, I think I know the answer to this -- but if  
25 Osage Minerals ends up as the only plaintiff in this case, is

1 there any reason to think they would not seek or need this same  
2 discovery?

3 **MS. McCLANAHAN:** Oh, I think they would certainly need  
4 the same discovery.

5 **THE COURT:** Your interests are aligned from everything  
6 that I understand, --

7 **MS. McCLANAHAN:** Right.

8 **THE COURT:** -- meaning if Osage Minerals ends up as  
9 the plaintiff, I have no reason to believe these documents  
10 would not be requested or used by them.

11 **MS. McCLANAHAN:** And to be very clear, I mean, we're  
12 not seeking any kind of money damages --

13 **THE COURT:** Right.

14 **MS. McCLANAHAN:** -- or any damages on our own behalf.

15 **THE COURT:** Right.

16 **MS. McCLANAHAN:** Anything that we receive or any  
17 damages that we recover obviously belong to the mineral estate  
18 owner which is the Osage Nation.

19 **THE COURT:** Is AECI the only or primary purchaser of  
20 the electricity?

21 **MS. McCLANAHAN:** We don't know.

22 **THE COURT:** Okay.

23 **MS. McCLANAHAN:** We don't know.

24 **THE COURT:** That's who you know of right now and  
25 that's who you've asked?



1           **MS. McCLANAHAN:** That's what I know of based on press  
2 releases that both Osage Wind and AECI published on the  
3 Internet.

4           **THE COURT:** I'm asking to see what can of worms we're  
5 opening here and if we know that this is going to lead to 10  
6 other, you know, third-party subpoenas to other purchasers if  
7 you're trying to get a complete picture or whether you believe  
8 this subpoena is probably going to be the extent of it.

9           **MS. McCLANAHAN:** Based on -- so Mr. Fields and I have  
10 done some work to try and just understand the wind industry and  
11 the way these kinds of things work, I think that they would  
12 only be selling to one entity --

13           **THE COURT:** Okay.

14           **MS. McCLANAHAN:** -- and I think it would be this  
15 entity for the entire time that we're talking about.

16           **THE COURT:** I don't have any other questions for you,  
17 Ms. McClanahan.

18           **MS. McCLANAHAN:** Okay.

19           **THE COURT:** But also feel free to make any other  
20 arguments that you wish to make at this time.

21           **MS. McCLANAHAN:** Okay. And insofar as I believe  
22 Mr. Ray talked about there is something in the regulations  
23 about a royalty provision for minerals that are recovered and  
24 then sold, that's a minimum, it does set a minimum of 10  
25 percent, but the OMC can and frequently does negotiate

1 something different. I mean, that's what we're talking about  
2 with the federal government. We simply approve the lease after  
3 the OMC has negotiated it. So there's nothing in the  
4 regulations that says the damages would have been limited to or  
5 the lease would have been limited to. We know exactly what a  
6 lease would have said. That's just not true. They could have  
7 negotiated more.

8 I think, you know, you understand the position that I'm  
9 taking, but with respect to I kept hearing the words, you know,  
10 the nature of the wrong, the nature of the wrong. The nature  
11 of the wrong informed their final decision at the Tenth  
12 Circuit, but I don't think it at all limited the damages that  
13 the plaintiff -- that the minimal estate owner, if you will,  
14 could then seek based on the wrong. It was a trespass and  
15 they're not at all limited to the few activities that the Tenth  
16 Circuit found so overwhelming that it took it over the line  
17 into mining under the definition. The definition of mining is  
18 one question, but trespass and the damages that are allowed  
19 under that is a completely different issue, and that's where  
20 we're at now.

21 **THE COURT:** Okay. Thank you very much.

22 Mr. Ray.

23 **MR. RAY:** Just briefly, Your Honor, to a few things.

24 I want to be clear about the issue of timing. That was  
25 largely driven by the holidays, Your Honor. We requested --

1 some members of our team were traveling. This scheduling  
2 conference, that's -- to the extent there was no intentional  
3 delay. We frankly requested an extension of time until the day  
4 we filed this motion because, frankly, people were traveling  
5 for the holidays, and that really is the issue there, Your  
6 Honor.

7 Now, when we talk about the Tenth Circuit opinion, it is --  
8 and I'll just read from it because this is important, Your  
9 Honor. The court says, "We agree with Osage Wind, however,  
10 that merely encountering or incidentally disrupting mineral  
11 materials would not trigger section 211.3's definition. In  
12 other words, 'the simple removal of dirt does not constitute  
13 mining.' There is simply no sense in which the word 'mineral  
14 development' means only the removal of dirt without some  
15 further manipulation, commercialization, or offsite relocation  
16 of it. The problem here is that Osage Wind did not merely dig  
17 holes in the ground - it went further. It *sorted*" -- and they  
18 italicized "sorted" -- "the rocks, *crushed*" -- and they  
19 italicized "crushed" -- "the rocks into smaller pieces, and  
20 then *exploited* the crushed rocks as structural support for each  
21 wind turbine. The ultimate question is whether this  
22 operation" -- in other words, the same thing we said in the  
23 prior sentence -- "constitutes 'mineral development' as we have  
24 conceptualized the term. We hold that it does."

25 And then the next heading, Your Honor, is Sorting and

1 Crushing for Backfill Constitutes Mineral Development. Your  
2 Honor, that is the activity that the Tenth Circuit found to be  
3 wrong.

4 The Tenth Circuit did not find that the project itself was  
5 a trespass. There is nowhere in that opinion where they said  
6 that. The Tenth Circuit did not say anything about this  
7 project generally is an invasion of the mineral estate. I have  
8 just said what they said about that. It is only because -- the  
9 only reason that the requirement for a lease was triggered is  
10 because of this sorting, crushing, and exploiting the rocks as  
11 structural support for each wind turbine. That is what the  
12 Tenth Circuit said.

13 Now, Your Honor, we heard a little bit about what a lease  
14 might have looked like. Now, the only place in the regulation  
15 that talks about this is section 214, 214.10(d). Now, maybe  
16 Ms. McClanahan may be correct, perhaps you could negotiate a  
17 higher royalty than 10 percent, but it's still got to be based  
18 on the value of the minerals that was subject to this. In  
19 other words, the minerals that were subject to the operation  
20 the Tenth Circuit described, 100 percent of that sets the  
21 ceiling. And again, if it relates to those minerals and to  
22 that process, we produced it, we will produce it, it's going to  
23 be out there. It is this -- It is this effort to go further,  
24 principally as to this AECI subpoena. And, Your Honor, I would  
25 just like to say our understanding, based on conferring with

1 our client, is that's the only purchaser of power for the  
2 project. I believe Ms. McClanahan is correct about that. But  
3 it is this effort to capture any and everything about the  
4 project that we submit cannot be squared with the language I  
5 just quoted for the court.

6 And this *Davilla* case says nothing about disgorgement.  
7 I've read *Davilla*. *Davilla* is about an injunction and *Davilla*  
8 said that the court had not engaged in the proper equitable  
9 weighing. *Davilla* does not say you get disgorgement.  
10 *Davilla* -- disgorgement is never there, to the best I can tell,  
11 from at least the Tenth Circuit's opinion and the district  
12 court in the Western District. It says absolutely nothing  
13 about disgorgement.

14 Your Honor, I just believe, at bottom, the requirement to  
15 get a lease was triggered by very specific activities. It's  
16 not just because the project is there. It's not just because  
17 you broke ground. It's because of very specific activities.  
18 Discovery about those activities has been provided and will be  
19 provided. It is this effort to go to the project's revenues  
20 more generally that is not proper and we submit that that  
21 should at least be deferred until we have an answer from Judge  
22 Frizzell to that question.

23 **THE COURT:** Thank you.

24 Yes, Ms. McClanahan?

25 **MS. McCLANAHAN:** Your Honor, could I just add one

1 thing?

2 **THE COURT:** Of course.

3 **MS. McCLANAHAN:** Regarding, you know, what kind of  
4 lease would they have, they most likely, and I don't think it's  
5 fair to put this boundary along discovery, to say that they  
6 would have only negotiated for the exact rock that was crushed,  
7 just like the landowners did not, they're recognizing \$250,000  
8 per year. And as Osage Wind, you know, was very proud to tell  
9 Judge Frizzell earlier in the case regarding whether or not the  
10 balance of harms would allow for an injunction in the oil and  
11 gas case, and they were saying, you know, that these landowners  
12 have entered into pre-construction during excavation,  
13 post-construction leases, and based on the kinds of sales that  
14 we are able to make for electricity they may take home \$250,000  
15 per year. There's no reason to think that the mineral estate  
16 owner would have said, "But I will simply settle for, you know,  
17 some 10 percent or even 100 percent of exactly the minerals  
18 that you take, I'm not interested in any of this royalty type  
19 provision that the surface owners are apparently selling to  
20 you."

21 I would also say that, on remand, *Davilla* certainly did  
22 consider disgorgement, and there's quite a bit of activity in  
23 the case after that. It appears to me, I'm just looking at the  
24 docket, that it did settle, but there was discovery regarding  
25 disgorgement and that was an open avenue of redress for the

1 harms that were had there.

2 And, of course, in *Davilla*, we actually had a lease, so  
3 they had done the right thing, the company had done the right  
4 thing with getting a lease, and then it stayed over after the  
5 lease for quite a period of time. Here, there never was a  
6 lease. We don't have any basis to think, well, this is what  
7 they probably would have settled for, that this is the way they  
8 previously had negotiate these types of things.

9 Those were the only two points that I had to add.

10 **THE COURT:** Thank you.

11 **MR. RAY:** Judge, just very briefly. I would just say  
12 that this regulation contem- -- this is the guidance in the  
13 very chapter of the Code of Federal Regulations that the Tenth  
14 Circuit was considering that talks about what a lease looks  
15 like. It says it's royalty-based, based on the minerals that  
16 were subject to these activities. The Tenth Circuit defined  
17 what those activities are in a very specific way when it said,  
18 "The only reason you had to get a lease here is because you  
19 sorted, crushed, and used." So, our discovery should be based  
20 on that set of conduct, and if it relates to that, Judge, we  
21 have provided it and we will provide it.

22 **THE COURT:** Thank you.

23 Okay. I'm going to give the parties an oral ruling today.  
24 I don't intend to issue a follow-up written order. If you want  
25 this legal ruling, of course, you can order a transcript, but I

1 like to warn people in advance that this is what you're going  
2 to get.

3 The motion to quash and alternative motion for protective  
4 order, docket 106, are both denied.

5 As to both subpoenas, defendants moved to quash on grounds  
6 that the United States is not a proper party to the case. As  
7 to the Hooper subpoena, defendants moved to quash on grounds of  
8 irrelevance because Hooper did not sort, crush, or exploit the  
9 minerals and, therefore, does not possess any relevant  
10 information as to damages.

11 As to the AECI subpoena, defendants moved to quash on  
12 grounds of irrelevance because equitable relief is not legally  
13 available and is not adequately pled. Alternatively,  
14 defendants seek a protective order delaying production until  
15 the district court rules on the above issues which are both  
16 presented and currently pending motions. Plaintiffs contend  
17 that defendants lack standing to object to these subpoenas and  
18 that all information is relevant to theories that are live and  
19 remain part of this lawsuit.

20 First, the court finds defendants do have personal standing  
21 to object to the extent the third parties are being asked to  
22 produce documents containing defendants' proprietary or  
23 confidential information. However, with respect to any  
24 confidentiality objections, the court finds the protective  
25 order entered sufficient to protect defendants' confidential



1 contracts or pricing information. Plaintiff does not object to  
2 defendants' contacting third parties and discussing any  
3 information that this should be produced pursuant to the terms  
4 of the protective order.

5 With respect to the relevance objection and timing issues,  
6 I find no need to reach plaintiff's standing objection. This  
7 court has the power on my own motion to quash or modify a  
8 third-party subpoena that seeks wholly irrelevant information,  
9 which is defendants' primary argument in this case. I also  
10 have authority to control the timing of discovery and entertain  
11 any arguments about delaying production pending rulings by the  
12 district judge. So, I really don't think the standing argument  
13 is relevant as to those because I have authority to reach both  
14 of those issues on my own motion in relation to a third-party  
15 subpoena.

16 So, with that, reaching the substance, the court first  
17 rejects the argument seeking to quash or delay the subpoenas  
18 based on the United States not being a proper party in the  
19 case. The United States is currently the party prosecuting  
20 this case on remand and it has not been dismissed. That issue  
21 will be decided in due course.

22 For purposes of discovery, I find it wholly permissible for  
23 the United States to continue issuing discovery in the case  
24 while that issue is pending. Further, that is clearly what was  
25 contemplated by Judge Frizzell at the scheduling conference.

1 He stated, "If there's a motion to excise them, we'll take that  
2 up. But I'm going to proceed here and set a discovery cutoff  
3 date." As a practical matter, some entity is going to have to  
4 prosecute this case on remand and this information is going to  
5 be requested by the Osage if not by the United States. I find  
6 no cause for quashing or modifying the subpoena based on the  
7 United States' lack of status as a party.

8 As to defendants' relevance argument related to the Hooper  
9 subpoena, the court finds the request relevant to the issue of  
10 damages. It is a completely open question in this litigation  
11 whether Hooper's construction of the power lines resulted in  
12 mining of the minerals under the Tenth Circuit's definition.  
13 In my view, this is an entirely proper subject of discovery and  
14 the United States is entitled to determine whether these  
15 activities increased the amount of damages.

16 Contrary to defendants' argument, I find the Tenth Circuit  
17 opinion not so clear that plaintiff should be entirely  
18 foreclosed from any discovery on this topic and this is better  
19 decided at later stages of the proceedings by Judge Frizzell.

20 As to the AECI subpoena, the court finds that Judge  
21 Frizzell gave every indication that the United States was  
22 entitled to discovery on this lost profits issue, even knowing  
23 at the time that this was going to be an open legal question,  
24 both as to whether the remedy was properly pled and whether the  
25 remedy is available at all. Further, as argued by the United

1 States, the court finds this information could be relevant to  
2 trespass money damages, as well.

3 The United States indicated its concern at the sched- --  
4 I'm sorry -- at the scheduling conference, the United States  
5 indicated its concern that defendants' position on lost profits  
6 would slow down discovery. This exact issue was discussed and  
7 Judge Frizzell stated, "It's not my intention that this case  
8 slow down," and indicated his view that the United States would  
9 be entitled to elect remedies after discovery on both issues.

10 So, reading that scheduling conference transcript, and  
11 consistent with that intent, I find the request proper and  
12 relevant to live issues in the case at this time.

13 Further, as admitted, there is no question the AECI  
14 documents are relevant to any lost profits or disgorgement  
15 equitable remedy that the United States constructs in the event  
16 that it is permitted by the district judge.

17 So, those are the substantive reasons that those motions to  
18 quash or somehow limit them are going to be denied. I want to  
19 be clear that I'm not making legal rulings or substantive legal  
20 rulings on these questions. I just find that they are live  
21 issues in the case and that the requested discovery is relevant  
22 to those live issues in the case. I don't find any reason to  
23 circumvent the discovery at this point in time. The worst  
24 thing that can happen is that the documents are produced and  
25 then down the road the district court indicates that certain

1 remedy wasn't available.

2       Given the tight schedule that you've been given, that the  
3 United States has been given, the six-month deadline, and given  
4 Judge Frizzell's indication that he intends to keep that  
5 deadline, I think a better outcome is to permit the discovery  
6 at this time and let the United States have the information,  
7 even knowing there's a chance it may not end up being used.  
8 The bottom line is it's relevant because the issues are still  
9 in the case.

10       Again, I find that any delay with respect to the  
11 alternative request to delay production, the court finds delay  
12 is not warranted and is, in fact, contrary to the scheduling  
13 order's intent. In setting the six-month discovery schedule,  
14 Judge Frizzell was well aware there were unresolved legal  
15 questions and he nonetheless told the United States, "We're  
16 going to try to hold you to that six months" and "be sure to  
17 get your experts and proceed apace." So, I think any contrary  
18 ruling by me at this juncture is very likely to hinder that, to  
19 cause unnecessary delay, and I'm going to permit this discovery  
20 to proceed at this time.

21       Is there anything further from the United States?

22               **MS. McCLANAHAN:** No, Your Honor.

23               **THE COURT:** Is there anything further, Mr. Ray?

24               **MR. RAY:** The only thing potentially I can think of,  
25 Your Honor, is what's the timing for production --

1           **THE COURT:** Production?

2           **MR. RAY:** -- of documents to occur?

3           **THE COURT:** Let's discuss that. Have the third  
4 parties indicated when they might be able to produce these  
5 documents? Is that what you're getting at, Mr. Ray?

6           **MR. RAY:** That is.

7           **THE COURT:** A deadline, do you want this court to set  
8 a deadline for the third parties?

9           **MR. RAY:** I just raise that as a potential issue that  
10 we may encounter.

11           **THE COURT:** Well, sure. Given everything I expressed  
12 about my concerns about timing, --

13           **MR. RAY:** Certainly.

14           **THE COURT:** -- that seems legitimate.

15           **MS. McCLANAHAN:** I believe all of the subpoena targets  
16 that are at issue here had actually contacted us and they were  
17 willing to turn over the documents. They received phone calls  
18 from defendants' counsel telling them not to do so. They  
19 received a copy of the motion that's currently --

20           **THE COURT:** Sure.

21           **MS. McCLANAHAN:** -- in front of you and discussed that  
22 with me. I have no reason to think that the documents -- AECI  
23 has already produced some, and I believe it was Hooper's  
24 counsel that said, "I'll have to find whatever I can find," and  
25 they intended to comply with the subpoena, I believe, except

1 for the fact that defendants' counsel had instructed them not  
2 to.

3 **THE COURT:** What time do you think? Seven days?

4 **MS. McCLANAHAN:** I think seven days is reasonable,  
5 yes.

6 **THE COURT:** Okay. I'm going to enter minutes that say  
7 the motion to quash or motion for protective order is denied  
8 for the reasons stated at the hearing, and then I'll set the  
9 deadline for the third parties in that minute so that they  
10 know.

11 Mr. Ray, does that -- do you have any other concerns about  
12 that?

13 **MR. RAY:** I think that's adequate, Judge.

14 **THE COURT:** Okay. All right. Thank you. Court's  
15 adjourned.

16 **THE DEPUTY COURT CLERK:** All rise.

17 (PROCEEDINGS CLOSED)

18 **REPORTER'S CERTIFICATION**

19 WHILE NOT PRESENT IN PERSON TO STENOGRAPHICALLY REPORT THE  
20 FOREGOING PROCEEDINGS, I CERTIFY THAT IT WAS TRANSCRIBED TO THE  
21 BEST OF MY ABILITY FROM A DIGITAL AUDIO RECORDING.

22  
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